New Columbus Nursing Home, Inc. *and* Teamsters Local Union No. 122, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 1-CA-19009

August 23, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on August 27, 1981, and an amended charge filed on October 7, 1981,[1] by Teamsters Local Union No. 122, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), and duly served on New Columbus Nursing Home, Inc. (herein called Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint on October 9 against Respondent, alleging that Respondent had engaged in certain unfair labor practices. Upon a second amended charge filed on November 10 by the Union and duly served on Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 1, issued an amended complaint on November 18 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and amended charges and the complaint and amended complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the amended complaint alleges in substance that on or about July 10 a majority of the employees of Respondent designated or selected the Union as their representative[2] for the purposes of collective bargaining in three units (A, B, and C) described as appropriate in the complaint; that, commencing on or about September 15 and 29 and October 2, and at all times thereafter, Respondent refused and continues to refuse to meet and bargain collectively with the Union as the exclusive representative of the employees in each of the units described as appropriate in the complaint; and that, since on or about the same dates, Respondent has refused and continues to refuse to provide the Union with certain information requested by it which is relevant to, and necessary for, the Union's performance of its function as the exclusive collective-bargaining representative of the employees. On October 19 and November 30, Respondent filed its answers to the complaint and amended complaint, respectively, admitting in part, and denying in part, the allegations in the complaints.

On December 16, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment.[3] Subsequently, on December 28, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the amended complaint and in its response to the Notice To Show Cause Respondent admits that elections were held on or about July 10, in the three units described in paragraph 8 of the amended complaint, and that tallies of ballots revealed that a majority of the ballots were cast on behalf of the Union in each of the units. Respondent denies that the units set forth in the complaint constitute appropriate units for the purposes of collective bargaining and denies that a majority of the employees in each of the respective units were permitted to properly select the Union on grounds the Union purportedly "made a misleading and deceptive statement regarding a material issue (the Union's financial condition), within the special knowledge of the Union, under circumstances that deprived" Respondent of an opportunity to make an effective reply. Respondent admits that the Union requested that Respondent bargain collectively with it in respect to rates of pay, wages, hours of employment, and other conditions of employment; that the Union requested that Respondent furnish the Union with certain information de-

[1] All dates herein are in 1981 unless designated otherwise.

[2] Official notice is taken of the record in the representation proceeding, Cases 1-RC-17289, 1-RC-17290, and 1-RC-17291, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[3] Thereafter, on December 18 and 24, respectively, counsel for the General Counsel filed a motion and further motion to correct inadvertent errors in the Motion for Summary Judgment.

tailed in the amended complaint; and that Respondent has declined to meet and bargain with the Union and has declined to furnish said information. Respondent, however, denies that the Union has at all times material herein been the lawfully elected representative of the employees in the respective units. Thus, Respondent argues that the Board should conduct a hearing on the allegations in the amended complaint because there has been no evidentiary hearing in the prior representation proceeding regarding Respondent's objections to the conduct of the elections relating to the effect on the eligible voters of the Union's purported misrepresentation. The General Counsel in his Motion for Summary Judgment contends that it is obvious from Respondent's answer to the amended complaint that Respondent desires to relitigate issues resolved in the representation proceeding; and that such purpose is further disclosed by Respondent's posting of a notice to its employees dated September 25 asserting that Respondent did not "intend to recognize the [Union as the employees'] bargaining representative," but would instead await court rulings on whether the "election was fair," and that Respondent had been advised it was "under no present legal obligation to meet with the [U]nion." We agree with the General Counsel.

Review of the record herein discloses that the Regional Director issued a Decision and Direction of Elections on June 9, and an amendment thereto on July 2, in which he directed elections in three units found appropriate at Respondent's facility. On June 22, the Employer (Respondent herein) filed a request for review of the Decision and Direction of Elections. The Board denied said request for review on July 6. On July 10, secret-ballot elections were conducted in the units found appropriate. The tally of ballots in each unit disclosed that a majority of the ballots was cast for the Union, with no determinative challenged ballots. On July 15, the Employer timely filed objections to the conduct of the elections and to the conduct affecting the results of the elections. On August 3, the Board denied the Petitioner's (the Union's) request for review of the Regional Director's amendment to his Decision and Direction of Elections.[4] Following an investigation of the objections, the Regional Director on August 14 issued a Supplemental Decision and Certifications of Representative, in which he overruled the Employer's objections in their entirety, and certified the Union as the collective-bargaining representative of the employees in each of the three appropriate units. On August 27, the Employer filed a request for review of the Regional Director's Supplemental Decision and Certifications of Representative. On September 15, the Board denied that request for review.

Respondent in its answer to the amended complaint and in its response to the Notice To Show Cause offers no justification for its admitted refusals to meet and bargain with the Union or to furnish it with relevant information, except to claim that the Board's determinations as to the units and the validity of the elections and the Union's certifications were erroneous. We find no merit in these contentions.[5]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor

[4] The denial of review was without prejudice to the Petitioner's right to again raise the issue in the event that an individual's challenged ballot proved determinative. As noted above, there were no determinative challenged ballots.

[5] While the amended complaint does not specifically allege the Union's certifications in the units of Respondent's employees found appropriate, the exhibits herein include, *inter alia*, the Regional Director's Supplemental Decision and Certifications of Representative and the Board's denial of Respondent's request for review thereof. Accordingly, we find, as alleged in the Motion for Summary Judgment, that the units set forth in the amended complaint are appropriate, and that the Union was properly certified in said units.

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

practice proceeding.[7] Accordingly, we grant the Motion for Summary Judgment.[8]

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Massachusetts corporation, at all times material herein has maintained its principal office and place of business at 910 Saratoga Street, Boston, Massachusetts, where it is now and has been engaged in the operation of a long-term convalescent home. In the course and conduct of its business described above, Respondent annually receives gross revenues in excess of $250,000, and annually receives goods valued in excess of $50,000 directly from clients located outside the Commonwealth of Massachusetts.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters Local Union No. 122, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The units

The following employees of Respondent constitute units appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

A.

All full-time and regular part-time registered nurses employed by Respondent at its Boston, Massachusetts, facility, but excluding all other employees, guards and supervisors as defined in the Act.

B.

All full-time and regular part-time licensed practical nurses employed by Respondent at its Boston, Massachusetts, facility, but excluding all other employees, casual employees, irregular part-time employees, guards and supervisors as defined in the Act.

C.

All full-time and regular part-time service and maintenance employees, including nurses' aides orderlies, dietary aides, housekeepers, cooks, kitchen employees, laundry employees, activities aides, program aides and medical records clerks employed by Respondent at its Boston, Massachusetts, facility, but excluding all other employees, casual employees, irregular part-time employees, guards and supervisors as defined in the Act.

2. The certification

On July 10, a majority of the employees of Respondent in each of said units, in secret-ballot elections conducted under the supervision of the Regional Director for Region 1, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said units on August 14, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 13 and 30 and August 18, and at all times thereafter, the Union has requested Respondent to bargain collectively with and to furnish certain relevant information to

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[7] We concur with Respondent that its answer to various paragraphs of the amended complaint, asserting it was without knowledge or information sufficient to form a belief as to certain allegations, served as denials rather than admissions, and that Respondent did not *per se* admit that it "violated the Act" as suggested in the Motion for Summary Judgment. Respondent nevertheless admits the operative facts; i.e., that the Union was certified and requested that Respondent bargain and provide information, and that Respondent declined to do so based on its objections to the elections. The mere assertion of error accompanied by arguments already considered and rejected by the Board in the underlying representation proceeding does not constitute special circumstances warranting a reexamination of that proceeding at this time, nor suffice as a defense to the Motion for Summary Judgment. We find no merit in Respondent's apparent contention that because certain letters from the Union asking Respondent to bargain were sent to its counsel rather than to Respondent's facility they should be deemed inadequate to demonstrate such demands. Indeed, Respondent concedes that the letters were in response to correspondence from its counsel attempting to establish on its own terms an "informal" negotiating arrangement in lieu of its obligation to formally bargain with the Union.

[8] We construe the General Counsel's motion as intended to apply to, and grant it only insofar as it pertains to, those matters alleged in the amended complaint. We do not pass on matters contained in the original and first amended charges which were encompassed in the initial complaint but not included in the amended complaint.

Counsel for the General Counsel in his Motion for Summary Judgment "moves . . . that since on or about July 13, 1981 . . ." Respondent has refused to meet and bargain with the Union, and since "on or about July 30, 1981" has refused to supply the Union with information. We shall construe these dates as error. The amended complaint alleges that Respondent refused to provide the information requested by the Union and refused to meet and bargain with the Union since on or about September 15 and other subsequent dates. We shall therefore treat this as the operative date, subject to the discussion in fn. 9 *infra*.

the Union as the exclusive collective-bargaining representative of all the employees in the above-described units. Commencing on or about September 25,[9] and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with and to furnish certain relevant information to the Union as the exclusive representative for collective bargaining of all employees in said units.

Accordingly, we find that Respondent has, since September 25, and at all times thereafter, refused to bargain collectively with and to furnish certain relevant information to the Union as the exclusive representative of the employees in the appropriate units, and that, by such refusals, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with and furnish the Union with information necessary and relevant to the Union as the exclusive representative of all employees in the appropriate units, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate units will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate units. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. New Columbus Nursing Home, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local Union No. 122, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

A.

All full-time and regular part-time registered nurses employed by Respondent at its Boston, Massachusetts, facility, but excluding all other employees, guards and supervisors as defined in the Act.

B.

All full-time and regular part-time licensed practical nurses employed by Respondent at its Boston, Massachusetts, facility, but excluding all other employees, casual employees, irregular part-time employees, guards and supervisors as defined in the Act.

C.

All full-time and regular part-time service and maintenance employees, including nurses' aides orderlies, dietary aides, housekeepers, cooks, kitchen employees, laundry employees, activities aides, program aides and medical records clerks employed by Respondent at its Boston, Massachusetts, facility, but excluding all other employees, casual employees, irregular part-time employees, guards and supervisors as defined in the Act.

4. Since August 14, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate units for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

[9] Although the amended complaint lists this date as September 15, such date is not supported by the record. The exhibits submitted with the Motion for Summary Judgment indicate the date was September 25, the date of Respondent's posted notice to its employees, discussed *supra*, informing them that Respondent did not intend to recognize the Union, but rather to await court rulings on its objections to the elections. We find that Respondent's refusals commenced on September 25.

5. By refusing on or about September 25, and at all times thereafter, to bargain collectively with and to furnish relevant information to the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate units, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain and to provide relevant information, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, New Columbus Nursing Home, Inc., Boston, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Teamsters Local Union No. 122, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate units:

A.

All full-time and regular part-time registered nurses employed by Respondent at its Boston, Massachusetts, facility, but excluding all other employees, guards and supervisors as defined in the Act.

B.

All full-time and regular part-time licensed practical nurses employed by Respondent at its Boston, Massachusetts, facility, but excluding all other employees, casual employees, irregular part-time employees, guards and supervisors as defined in the Act.

C.

All full-time and regular part-time service and maintenance employees, including nurses' aides orderlies, dietary aides, housekeepers, cooks, kitchen employees, laundry employees, activities aides, program aides and medical records clerks employed by Respondent at its Boston, Massachusetts, facility, but excluding all other employees, casual employees, irregular part-time employees, guards and supervisors as defined in the Act.

(b) Refusing to furnish the above-named labor organization with information necessary and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the employees in the units described above.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate units with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, furnish the Union with information necessary and relevant to the Union's performance of its function as the exclusive collective-bargaining representative in the aforesaid units, including the following:

(i) Dates of employment for all full-time and regular part-time registered nurses, licensed practical nurses, and service and maintaince employees.

(ii) Job classifications and descriptions for the above-mentioned employees.

(iii) Hourly wage rates for the above-mentioned employees

(iv) All medical, life, and retirement insurance policies, including any riders and plan description booklets, which New Columbus Nursing Home, Inc., has retained for the benefit of the above-mentioned employees.

(v) Employees' Personnel Policy Manual for New Columbus Nursing Home, Inc.

(c) Post at its Boston, Massachusetts, facility copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with, or refuse to furnish relevant information to, Teamsters Local Union No. 122, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining units described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, and furnish it with relevant information, as the exclusive representative of all employees in the bargaining units described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining units are:

A.

All full-time and regular part-time registered nurses employed by the Employer at its Boston, Massachusetts, facility, but excluding all other employees, guards and supervisors as defined in the Act.

B.

All full-time and regular part-time licensed practical nurses employed by the Employer at its Boston, Massachusetts, facility, but excluding all other employees, casual employees, irregular part-time employees, guards and supervisors as defined in the Act.

C.

All full-time and regular part-time service and maintenance employees, including nurses' aides orderlies, dietary aides, housekeepers, cooks, kitchen employees, laundry employees, activities aides, program aides and medical records clerks employed by the Employer at its Boston, Massachusetts, facility, but excluding all other employees, casual employees, irregular part-time employees, guards and supervisors as defined in the Act.

NEW COLUMBUS NURSING HOME, INC.